No. 94-1191

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC., and K.W.B. FARMS,
Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, TREASURE COAST ENVIRONMENTAL COALITION and MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and SAM POOLE, its Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and VIRGINIA WETHERELL, its Secretary,

CITY OF BELLE GLADE, and CITY OF CLEWISTON, FLORIDA SUGAR CANE LEAGUE, INC. and FLORIDA FRUIT and VEGETABLE ASSOCIATION
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

ARGUMENT

1. The Brief in Opposition like the Opinion Below offers no justiciability rationale for a United States lawsuit asking a federal court to require a state to enforce a nonexistent "low nutrient waters" standard against citizens because federal property "needs" or "requires" such waters.

The Brief in Opposition declares in opening, but never attempts to correlate with this Court's Article III jurisprudence, that the "complex ecosystems" of the Park "need low nutrient waters for their preservation" and "the Refuge also needs low nutrient waters to preserve its habitat." *Statement* ¶ 1. The Opinion Below elevates "needs" in this formula to "required"—"required . . . to preserve . . . native habitat."[1] Thus the Opinion describes as "polluted" the water which, as Congress anticipated 45 years ago, departs that pristine norm.[2] App. 6a. But neither Brief nor Opinion names any law which bestows *standing* on the United States to demand of state policymakers in federal court that they send those "low nutrient waters" that better suit federal "needs" in the political climate of a later age.

The court of appeals wrote in 1991 that "this move" of state policymaking to federal court "is legally proper"

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[1] Opinion below, 28 F.3d 1563, 1568 (11th Cir. 1994), App. 6a: "The Park has diverse and complex eco-systems that require non-polluted, low nutrient waters for their ecological integrity. . . . Low nutrient waters are also required in the Refuge to preserve its native habitat."

[2] As our Petition described, p. 6, the Secretary of the Interior specifically warned Congress in 1948 that, as a result of the Project recommended to and ordained by Congress to promote farming and other purposes, Pub. Law 80-858, "the characteristics of the waters with respect to their occurrence, movement, and quality, will be appreciably changed." As neither the Brief in Opposition nor the Opinion Below offers any standard for conventional adjudication, this litigation simply engages the federal courts in presiding over the political steps that are necessary to reverse the policy decision by Congress in 1948.

only if (1) "the state is not doing its job" and (2) "statutory authority supports federal proceedings." App. 30a, n. 7. The court of appeals has now written lengthy opinions (1991) and (1994) without even a word of how, absent the nuisance standard that the United States long ago abandoned as too generous, App. 35a, n. 10, federal courts are authorized to decide whether "[a] state is not doing its job" under state law; without even a citation identifying "a statute expressly conferring standing" on the United States,[3] or one "creating legal rights, the invasion of which creates standing";[4] and without attempting to trace the United States' "low nutrient waters" injury to some "putatively illegal action"[5] which federal courts may redress by conventional adjudication.

In an extraordinary overreach, the Brief in Opposition p. 9 argues without record reference that "the district court held that state law [§ 403.412, Fla. Stat. (App. 149a)] does afford the United States such a cause of action, and petitioners have failed to demonstrate any error in that ruling." That court made no such holding, on this indefensible proposition.[6] More to the point, the court

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[3] *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, ——, 112 S.Ct. 2130, 2145 (1992), quoting *Warth* and *Linda R. S.*, *supra* n.3.

[5] *Linda R. S.*, 410 U.S. at 617, *Warth*, 422 U.S. at 499, *supra* n.3; *Allen v. Wright*, 468 U.S. 737, 761 (1984) ("specific legal obligations whose violation works a direct harm").

[6] Section 403.412, which authorizes "citizens" and certain Florida officials to sue in state court to enjoin patent illegalities in state environmental law enforcement, is presented at App. 149a and described at Pet. pp. 12-13, 21 text at n.12, 28. At the request of the United States the district court dismissed counts I and II so that what the United States Attorney described as a "futile" 30-day "demand" letter could be made on the state agencies under § 403.412 more than a year after the litigation began without any such demand.

AUSA Ponzoli to the court, Dec. 12, 1989, R33-1252-41 (transcript): "It will be a futile action if the court so chooses. We will

of appeals (whose decision is submitted for review) also chose not to rely on § 403.412 for **standing** or other necessities of **justiciability.** In 1991 that court obviously knew of the statute and alluded to its "certain notice requirements." [7] In 1994 the court said nothing of that statute, saying simply: "The justiciability of the controversy rests on the government's assertion that the use of its public lands is being destroyed by nutrient-laden water because the State agencies are not fulfilling their legislatively enacted duties." App. 15a. Neither the Opinion nor the Brief in Opposition identifies a standard in state law of "low nutrient waters . . . required . . . to preserve its native habitat" (App. 6a), nor any "legislatively enacted duties" whose neglect in 1988 is thought to have justified this action.

In other words, while the Brief in Opposition repeatedly describes "failure to regulate" as the gravamen of this action in 1988 "to compel the state defendants to regulate" (pp. 2, 3) as "mandated by state law and by their contracts" (p. 7), the Solicitor General identifies no such "mandate" in any source document, indeed ig-

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go through that exercise. . . . Any remedy that came up in 30 days is not going to do it. We have briefed extensively the futility of appealing to these particular state agencies. They have conceded there can be no quick fix." At *id.* p. 69: "Well, I think I would ask you, Your Honor, to stay and let me send the letters. . . . There is no detriment to the entire action. We will send them the letters. They can't fix them in 30 days. They know it and I know it. There is no harm in doing that."

R8-375-2, Order of Jan. 2, 1990: "The United States . . . shall have forty days from the date of this Order to amend the Amended Complaint contingent upon service of a verified complaint on the defendant agencies pursuant to Fla. Stat. 403.412."

[7] Having called for "statutory authority" for "this move" to federal court, App. 30a at n.7, the court of appeals (1991) in referring to the "notice requirements" of the unidentified § 403.412 conspicuously ignored that statute as a claimed source of United States standing in an expressly created right of action. App. 25a at n.1.

nores our showing that the 1987 Florida Legislature relegated the development of this regulatory plan to third place among the agencies' priorities. Pet. pp. 9, 10. Certainly the Solicitor General refers to no text in the 1952 Refuge license or the 1984 Park Agreement "mandating" that a "low nutrient waters" standard or any other be "established"; so it may not be said that a Decree which "establishes" such limits and "specific remedial programs designed to achieve those limits" (Brief in Op. p. 3) redresses the neglect of that "mandate."

2. The Opinion Below dispenses with justiciability, Tenth Amendment and Guarantee Clause objections saying there was no adjudication: the district court " 'effect[ed] a transfer of these proceedings [back] to a state administrative forum.' " App. 10a. Now the promised hearing has been cancelled, but the Brief in Opposition dispenses with the same objections saying "the state legislature has since enacted, accepted, and adopted [the Settlement Agreement] as law." Br. p. 9. But the legislature acted in consequence of the federal judiciary's assertion of power, and still, Florida continues under the coercion of that asserted judicial power.

If it took new legislation in 1994 to "accept" the terms of the Settlement Agreement, then plainly the purpose and justification for this incursive litigation 1988-1994 was not as the court of appeals claimed, "to achieve compliance with state law." App. 10a. The "essence of the Agreement" was rather to consolidate state and federal political power in a federal court, and from that power base to direct the creation of new state law, administratively or legislatively, burdening the Farmers.

" 'The Agreement does no more than set in motion a process,' " both these lower courts said. App. 10a. But it was this federally-dictated "process," ultra vires of Florida law and the United States Constitution, to which Governor Chiles "surrendered my sword" in May 1991,

exclaiming that he did not know what "the United States" wanted the state to do. His quandary was genuine: there were no extant **justiciable** standards requiring "low nutrient water" sufficient "to preserve . . . native habitat"; nor was there any statutory warrant for state agencies to obliterate the priorities that Congress incorporated physically in the Central and Southern Florida Flood Control Project, in 1948. Governor Chiles could only "surrender my sword" and await instruction from the United States Attorney as to Florida's state law duties.

And so the collaborating state and federal officials prevailed on the 1994 legislature to dispense with the hearing that those officials had once assured the Farmers, in district court.

And the federal court in Florida still presides over this sector of Florida's government.

The Miccosukee Tribe of Indians, a respondent here, has importuned the district court to enforce the Settlement Agreement in several respects where it is inconsistent with the 1994 Florida legislation.

The United States and state agencies have assured the district court that they are working on a new Settlement Agreement which will adapt to the 1994 legislation where their interests coincide.

The Technical Oversight Committee ordained by the Settlement Agreement, though never endorsed by either a state administrative process or the 1994 legislation which cancelled that hearing, still sits in SFWMD, dictating through its majority of federal appointees how the Florida agencies shall next carry out their state law responsibilities.

And still, the federal courts which earlier refused to hear at all of their want of Case-or-Controversy powers, and which recently, hearing the objection at last, have

shunted aside the accustomed analysis of this Court, sit in judgment of Florida's state law water policy.

Respectfully submitted,

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